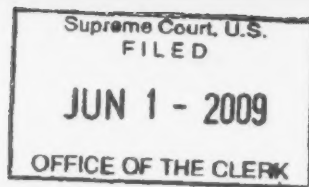


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No. 08-1156

In the Supreme Court of the United States

AT&T MOBILITY LLC AND
AT&T MOBILITY CORPORATION,

Petitioners,

v.

CHARLENE SHORTS AND
PALISADES COLLECTIONS LLC,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In his dissent from the denial of rehearing en banc, Judge Niemeyer invited this Court to grant certiorari. He explained that the case involves “an important issue of statutory interpretation” and that “the majority’s interpretation creates an unfortunate loophole in [CAFA] that only the Supreme Court can now rectify.” Pet. App. 37a.

The need for review is confirmed by the amicus brief filed by the Chamber of Commerce, which both represents businesses that are defendants in interstate class actions and played a significant role in CAFA’s enactment. Br. 1-2. On the basis of this experience, the Chamber predicts that the decision below will result in “widespread circumvention” of the Act, “largely undoing the changes instituted by CAFA” and “substantially compromising the statute’s effectiveness,” and that the decision will therefore have “an immediate, substantial impact on class action litigation in the United States.” Br. 4-5.

The need for review is also confirmed by Shorts’ brief in opposition, which offers no persuasive reason why the Court should decline Judge Niemeyer’s invitation.

A. This Court Has Jurisdiction

Shorts contends that this Court lacks jurisdiction to review the decision below. She argues that (1) “[28 U.S.C.] § 1447(d) is a complete bar to appellate jurisdiction” and (2) “the well-pleaded complaint * * * shows no basis for federal jurisdiction.” Opp. 5, 7. Neither Section 1447(d) nor the “well-pleaded complaint” rule applies here.

1. Section 1447 is titled "Procedure after removal generally." Subsection (d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Section 1453 is titled "Removal of class actions." Subsection (c)(1) provides that, "*notwithstanding section 1447(d)*, a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed" (emphasis added).

As it correctly concluded, the court of appeals "possess[ed] jurisdiction to review the district court's remand order under 28 U.S.C. § 1453(c)(1)." Pet. App. 5a. It follows that this Court has jurisdiction to review the court of appeals' decision under 28 U.S.C. § 1254(1), which provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court" by writ of certiorari.

Shorts asserts that "Congress declined to provide, in CAFA, for an appeal to the Supreme Court." Opp. 6. But Congress did not have to provide for review by this Court in CAFA. Such review is already authorized by Section 1254(1) for any case "in" the court of appeals, and an appeal under Section 1453(c)(1) is assuredly such a case. If Congress had wished to limit this Court's jurisdiction, it would have done so explicitly, as it has done elsewhere. See, e.g., 28 U.S.C. § 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application [for a writ of habeas corpus] * * * shall not be the subject of a petition * * * for a writ of certiorari."). There is no such limitation in CAFA.

Shorts also asserts that CAFA's "strict time limits for [appellate] review have now passed." Opp. 3-4. But the 60-day deadline for a decision applies to "the court of appeals." 28 U.S.C. § 1453(c)(2). The only timing requirement applicable in *this* Court is that the petitioner file its petition for certiorari within 90 days from the date on which the court of appeals denied rehearing. Sup. Ct. R. 13. ATTM has done so.

Shorts purports to find it "[r]emarkabl[e]" that the petition "makes [no] reference to § 1447(d)." Opp. 7. But because Section 1447(d) has no applicability to a class action like this one, and because this case was properly in the court of appeals under Section 1453(c)(1), the only "remarkable" omission is *Shorts'* failure to explain why this Court lacks jurisdiction under Section 1254(1)—a provision, tellingly, that she does not even cite. Shorts also fails to explain why Congress would have divested of jurisdiction the only Court capable of ensuring uniform application of a statute that regulates interstate class actions.

2. Shorts' second jurisdictional argument is that, under the "well-pleaded complaint" rule, a case cannot be removed unless the district court's jurisdiction is established on the face of the complaint and that Palisades' state-court complaint does not establish federal jurisdiction. Opp. 1 & n.2, 7, 11. That argument is equally baseless.

This case involves diversity jurisdiction, under 28 U.S.C. § 1332. The well-pleaded complaint rule applies only in cases involving federal-question jurisdiction, under 28 U.S.C. § 1331. This Court explicitly so held in *American National Red Cross v. S. G.*, 505 U.S. 247 (1992), a case that Shorts does

not cite. There the Court made “short work” of the argument that a “conferral of federal jurisdiction” other than one based on a federal question is “subject to the requirements of the ‘well-pleaded complaint’ rule * * * limiting the removal of cases from state to federal court.” *Id.* at 258. The Court explained that the plaintiffs had “erroneously invoke[d]” the rule “outside the realm of statutory ‘arising under’ jurisdiction, *i.e.*, jurisdiction based on 28 U.S.C. § 1331.” *Ibid.* The well-pleaded-complaint rule, the Court held, “applies only to statutory ‘arising under’ cases”; it “has no applicability” to cases “based on a separate and independent jurisdictional grant.” *Ibid.* That includes diversity. See *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 644 n.12 (2006); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8 (1983). The decisions on which Shorts relies—*Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002), and *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009)—are federal-question cases.

It would be particularly inappropriate to apply the “well-pleaded complaint” rule in a diversity case, like this, in which federal jurisdiction was created by the *non*-removing party. One of the principal purposes of the rule is to prevent a defendant from removing on the basis of a claim asserted by the *defendant*, because that would defeat the plaintiff’s choice of a state forum. See *Holmes Group*, 535 U.S. at 831-832; *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-399 (1987). In this case, the defendant (more specifically, the “additional” counterclaim defendant) has sought to remove on the basis of a claim asserted by the *plaintiff* (more specifically, the counterclaim plaintiff)—namely, Shorts’ class-action allegations. ATTM’s removal no more defeats Shorts’ choice of a

state forum here than in any case in which the plaintiff's state-court action is one over which there is federal jurisdiction.

B. The Question Presented Is An Important One

The court below held that a qualifying class action can be removed to federal court under CAFA if it is filed as an independent suit but not if it is filed as a counterclaim to an existing suit. As the petition explains (at 21-24), that holding is highly consequential, because it undermines CAFA's basic purpose, which is to prevent plaintiffs' lawyers from manipulating pleadings to keep interstate class actions in state court. Shorts does not deny that the decision below permits—and indeed encourages—precisely what CAFA was enacted to prevent. Instead, she argues that certiorari should be denied because (1) there is not yet a circuit conflict and (2) ATTM overstates the likelihood that the issue will recur. Opp. 7-13. Shorts is mistaken on the second point; and the first is not a reason to deny review.

1. A commentary on the decision below correctly described the filing of class-action counterclaims in cases of this type as “an increasingly frequent scenario.” Don Zupanec, *Palisades Collections LLC v. Shorts*, 24 FED. LITIGATOR 7 (Feb. 2009). Shorts nevertheless contends that there is a “dearth of actual cases on point.” Opp. 13. According to her, “only six counterclaim class actions have been removed to the federal courts” since CAFA's enactment in 2005. *Ibid.*; see *id.* at 8-9 n.9 (citing cases).

That figure is too low. To begin with, it omits at least three identifiable cases in which a counterclaim class action was removed: this case; a case cited by

Shorts herself, *FLA Card Services, N.A. v. Gachiengu*, 2008 WL 336300 (S.D. Tex. Feb. 5, 2008); and a case decided less than two months ago, *Deutsche Bank National Trust Co. v. Weickert*, 2009 WL 1011098 (N.D. Ohio Apr. 15, 2009). Even as modified, moreover, the figure includes only cases in which there is an electronically available written decision. That is likely an inaccurate measure of the number of state-court cases in which a defendant has filed a counterclaim class action, because it does not capture those in which (a) the counterclaim defendant has decided not to remove (perhaps because of adverse precedent); (b) the counterclaim defendant has decided to remove but has not yet done so; (c) the counterclaim plaintiff has not yet filed a motion to remand; (d) the district court has not yet acted on the motion; (e) the court acted on the motion without issuing a written order; or (f) the order is not electronically available.

Even if it were true that there have been only nine post-CAFA cases in which a state-court defendant filed a counterclaim class action, the cases would still represent, in the words of Shorts' own consultant, "just the tip of an approaching iceberg." Pet. 23. Shorts points out that the same article argues that counterclaim defendants have no authority to remove. Opp. 12. But a law professor's defense of counterclaim class actions makes it *more* likely that plaintiffs' lawyers will employ the tactic, not less. The same is true of the Fourth Circuit's decision here. Indeed, one of the central points of the petition is that review is warranted because the decision provides a roadmap on how to circumvent the Act. Whatever the precise number of class-action counterclaims that have been filed since CAFA's enactment, therefore, there are sure to be many more now that

the Fourth Circuit has given the practice its imprimatur.

Shorts suggests that there are not likely to be many such cases, because “joinder rules limit the use of class action counterclaims.” Opp. 13. But in the typical class action against a “joined” party that gives rise to the issue here—a case in which B attempts to collect a debt from A, who then counterclaims against B and joins C, the entity that sold the debt to B—there is no reason (and Shorts provides none) to think that A will be unable to join C as an “additional” counterclaim defendant under state law. In any event, the Fourth Circuit held that CAFA does not authorize removal by *any* counterclaim defendant, “additional” or otherwise (Pet. App. 14a n.4), and that is the question on which ATTM is seeking review (Pet i). The supposed difficulty of “joinder” would not prevent the issue from arising in cases—of which there are already several—where the defendant filed a counterclaim only against the plaintiff and did not join any “additional” counterclaim defendant.

Finally, there need not be scores, or even dozens, of cases in which the question presented arises before it can be considered sufficiently important to warrant this Court’s intervention. By the very nature of the issue, there is a large amount of money at stake—at least \$5 million (the jurisdictional threshold) in every case; tens of millions of dollars in this one (Pet. App. 53a)—and there is generally a higher probability of coercive settlement when a case remains in state court. For that reason, the identifiable cases that present the issue, the substantial likelihood that there are others, and the near certainty that there will be many more are—

collectively—sufficient to justify review. “Th[e] enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari.” *Fidelity Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., joined by Alito, J., concurring)

2. Shorts also contends that certiorari should be denied because “there is no circuit split to resolve.” Opp. 7. As the petition explains (at 9-10), however, that is not a reason to deny review when the decision below is seriously flawed, fundamentally undermines the core purpose of an important statute, and threatens nationwide harm; when both sides of the issue have been exhaustively explored in the majority and dissenting opinions; and when awaiting another case would require class-action defendants to continue expending large sums of money in defense and settlement of the very type of state-court litigation that CAFA was enacted to prevent. That is doubtless why Judge Niemeyer urged this Court to give the case “early consideration.” Pet. App. 36a-37a.

There is another reason why the absence of a circuit conflict is not a basis for denying review. After the petition in this case was filed, a district court in the Northern District of Ohio held that “additional” counterclaim defendants “may properly remove th[e] case to this Court under CAFA.” *Deutsche Bank Nat’l Trust Co.*, 2009 WL 1011098 at *3. (The Sixth Circuit will not decide the issue in that case, because the counterclaim plaintiffs did not seek permission to appeal.) Shorts is therefore mistaken in her contention that there is “no case * * * that purports to allow removal [by a counterclaim defendant] pursuant to CAFA.” Opp. 7 n.7. While the conflicting district court decision obviously does not provide a basis for

certiorari *by itself*, see Sup. Ct. R. 10, it “reinforce[s] [the] other and more substantial bas[e]s for review,” E. Gressman et al., SUPREME COURT PRACTICE § 4.8, at 256-257 (9th ed. 2007).

C. The Court Of Appeals’ Decision Is Erroneous

As the petition explains (at 10-21), the decision below is inconsistent both with CAFA’s unambiguous text and with its undisputed purpose. The Act provides that “any” defendant may remove—a term, as this Court has repeatedly held, that means “of whatever kind.” Pet. 11. Because a counterclaim defendant is obviously a “kind” of defendant, the “plain language” of CAFA “clearly provides” that a counterclaim defendant has removal authority. Pet. App. 31a, 36a (Niemeyer, J., dissenting). But even if the statutory text does not unambiguously *authorize* removal by a counterclaim defendant, the text certainly does not unambiguously *prohibit* it. For that reason, the interpretation that is consistent with the Act’s purpose should be preferred to the one that is not. Shorts offers no persuasive counter-arguments.

1. Shorts contends that CAFA incorporates the holding of *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)—that a counterclaim defendant could not remove under the general removal statute then in effect—and that, as a removal statute, Section 1453(b) must in any event be strictly construed. Opp. 14-15 & n.16, 17-18. We explain in the petition (at 11-13) why those arguments are wrong. As to the first, because CAFA uses expansive language (“any defendant”), Congress could not have meant to incorporate an interpretation of restrictive language (“*the* defendant”). As to the second, the federalism-based canon of strict construction has no applicability to

CAFA, which explicitly “*liberalized* removal authority” and did so for the very purpose of “*further[ing]* the proper balance of federalism.” Pet. App. 30a (Niemeyer, J., dissenting) (first emphasis added).

Shorts provides no response to either point. She does argue that, because Congress considered but rejected the possibility of allowing removal by “class-member plaintiffs,” it “should not be presumed to have altered [the *Shamrock Oil* rule] silently.” Opp. 18. But Congress did decide to allow removal by “any defendant,” and thereby altered the *Shamrock Oil* rule *expressly*.

2. As for our argument that CAFA must be read in light of the congressional purpose, Shorts mischaracterizes it as one based upon “legislative history.” Opp. 15. In so doing, she ignores CAFA’s *text*, which provides, in a subsection titled “Purposes,” that one of “[t]he purposes of this Act” is to “provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction.” CAFA § 2(b)(2). The purpose explicitly set forth in the statute passed by both Houses of Congress and signed by the President is thus precisely the same as that reflected in the “legislative history”: to ensure that qualifying class actions can be litigated in federal court.

In this connection, it is telling that Shorts does not even cite, much less attempt to distinguish, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006), a case the petition discusses at length (at 20-21). *Dabit* involved a statute very much like CAFA and relied heavily on its purpose in interpreting it broadly to prevent plaintiffs’ lawyers from circumventing class-action limitations imposed by Congress.

Shorts argues that “there is no basis for inferring that Congress intended that all or even most class actions should end up in federal court,” because CAFA “does not require that any class action be filed in or removed to federal court” and the Act “require[s] district courts to remand class actions” in certain circumstances. Opp. 17. But ATTM has never suggested that Congress wanted *all* class actions to be litigated in federal court; and neither of the features of CAFA that Shorts identifies remotely supports the conclusion that Congress meant to prohibit counterclaim defendants from removing *qualifying* class actions. The class actions that district courts are required to remand, by definition, are not qualifying ones—*i.e.*, they are not “interstate cases of national importance.” CAFA § 2(b)(2). And the point of CAFA is not that class actions that *are* qualifying ones *must* be litigated in federal court, but that they *may* be at the defendant’s option. The decision below is erroneous because it deprives a defendant of that option in any case in which counsel chooses to plead a qualifying class action as a counterclaim rather than a freestanding suit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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